

**Letter of Findings Number: 09-0925P
Underground Storage Tank Fees
For the Tax Years 2003-2006**

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ISSUE

I. Underground Storage Tank Fee – Imposition.

Authority: 42 U.S.C. § 6991a; IC § 6-8.1-1-1; IC § 6-8.1-5-1; IC § 13-7-20-32; IC § 13-7-20-41; IC § 13-11-2-150; IC § 13-23-8-4; IC § 13-23-12-1; IC § 13-23-12-4; IC § 13-23-12-6; IC § 13-23-12-7; 40 CFR Part 280, Appendix II; Ball v. Ind. Dep't of Revenue, 563 NE2d 522 (Ind. 1990); [328 IAC 1-3-3](#); Black's Law Dictionary 891 (8th ed. 2004).

Taxpayer protests the imposition of environmental penalties for unpaid underground storage tank fees.

STATEMENT OF FACTS

Taxpayer owns and operates a supermarket. At this facility is a gas station. The gas station was built in 1988 or 1989, at which point two underground storage tanks (USTs) were installed. These USTs stored gasoline and were owned by another entity. In 2002, a third UST was installed on this property. This UST stored diesel fuel and was owned by Taxpayer. However, it was not until the spring of 2004 or 2005 that Taxpayer discovered that it was required to have registered the third UST with the Indiana Department of Environmental Management (IDEM). Taxpayer believes it registered the UST with IDEM in 2005. In May 2009, Taxpayer filed paperwork with IDEM to notify them that it was the owner of the two USTs that stored gasoline. In June 2009, the Department assessed registration fees for each year from 2000 to 2008 for the third UST. The Department also assessed a 10 percent penalty and interest on each fee. Finally, the Department also assessed a total of \$20,000 in "environmental penalties." These environmental penalties consisted of: \$2,000 for 2003; \$4,000 for 2004; \$6,000 for 2005; and \$8,000 for 2006. Taxpayer paid the required registration fees, plus the Department's 10 percent penalty and interest. Taxpayer protests the assessment of the remaining environmental penalties. An administrative hearing was held, and this Letter of Finding results.

I. Underground Storage Tank Fee – Imposition.

DISCUSSION

IC §13-23-12-1 imposes a fee on underground storage tanks. Although IDEM regulates underground storage tanks for the State, IC §13-23-12-4 mandates that the Department of Revenue collect and deposit the underground storage tank fees. IC § 6-8.1-1-1 defines "listed tax" to include "the underground storage tank fee ([IC 13-23](#))." The laws and regulations concerning the Department's collection of listed taxes apply to the Department's collection of the underground storage tank fees. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c).

The fee on USTs is imposed at IC §13-23-12-1 as follows:

(a) Each year the owner of an underground storage tank that has not been closed before July 1 of any year under:

(1) rules adopted under [IC 13-23-1-2](#); or

(2) a requirement imposed by the commissioner before the adoption of rules under [IC 13-23-1-2](#); shall pay to the department of state revenue an annual registration fee.

The amount of the registration fee is found in subsection of IC § 13-23-12-1 as follows:

(b) The annual registration fee required by this section is as follows:

(1) Ninety dollars (\$90) for each underground petroleum storage tank.

(2) Two hundred forty-five dollars (\$245) for each underground storage tank containing regulated substances other than petroleum.

If an owner of an UST does not pay their annual registration fees described in IC § 13-23-12-1, the owner "shall be assessed a penalty of not more than two thousand dollars (\$2,000) per underground storage tank for each year that passes after the fee becomes due and before the fee is paid." IC § 13-23-12-7(a). This penalty is referred to as the "environmental penalty." [328 IAC 1-3-3\(e\)\(3\)](#). The Indiana Administrative Code clarifies this penalty, stating that:

For sites containing only tanks that were never registered, or sites containing only tanks for which no tank fees were paid when due, the penalty will be calculated at two thousand dollars (\$2,000) under [IC 13-23-12-7\(a\)](#) per petroleum underground storage tank per year that passes after each year's fee is due. [328 IAC 1-3-3\(f\)\(2\)\(A\)](#).

Because taxpayer owned one UST, the Department assessed \$2,000 for 2003; \$4,000 for 2004; \$6,000 for 2005; and \$8,000 for 2006. This is because the penalty is cumulative. Per IC § 13-23-12-7(a), the penalty is "two

thousand dollars (\$2,000) per underground storage tank **for each year that passes after the fee becomes due and before the fee is paid" (Emphasis added)**. For example, if a fee on one of the tanks that was due in 2003 was not paid until 2007, then \$2,000 is assessed **for each year that passed** before that 2004 year fee was paid (\$2,000 for 2004; \$2,000 for 2005; \$2,000 for 2006; and \$2,000 for 2007). The same is true for the 2004 fee if it was not paid until 2007, the 2005 fee if it was not paid until 2007, and so on. With that being the case, the environmental penalties were assessed as illustrated below:

	2003	2004	2005	2006
2003 Fees	\$2,000.00	\$2,000.00	\$2,000.00	\$2,000.00
2004 Fees		\$2,000.00	\$2,000.00	\$2,000.00
2005 Fees			\$2,000.00	\$2,000.00
2006 Fees				\$2,000.00
Subtotal	\$2,000.00	\$4,000.00	\$6,000.00	\$8,000.00

Taxpayer argues that it mailed State Form 45223, the "Notification for Underground Storage Tanks" form, to IDEM in order to register this third UST on or around July 26, 2005. Taxpayer asserts that after it filed the 45223 form with IDEM, it should have received notifications each year that it owed an annual registration fee. Because it never had to pay registration fees on the other two USTs prior to 2009, Taxpayer was unaware that the annual registration fee existed. If it had received adequate notification, Taxpayer contends, Taxpayer would have known to pay the registration fee and it would have paid the fee at the time it was due.

IC § 13-23-12-6 states that:

[a]t least thirty (30) days before payment of a fee is due in accordance with the schedule established under section 3 of this chapter, the department of state revenue shall **attempt to notify** each owner of an underground storage tank **who has submitted notification to the department as required under 42 U.S.C. 6991a(a)** of the requirements of this chapter. **(Emphasis added)**.

42 U.S.C. § 6991a(a) states that:

(a) Underground storage tanks

(1) Within 18 months after November 8, 1984, each owner of an underground storage tank shall notify the State or local agency or department designated pursuant to subsection (b)(1) of this section of the existence of such tank, specifying the age, size, type, location, and uses of such tank.

...

(3) Any owner which brings into use an underground storage tank after the initial notification period specified under paragraph (1), shall notify the designated State or local agency or department within thirty days of the existence of such tank, specifying the age, size, type, location and uses of such tank.

...

(5) Beginning thirty days after the Administrator prescribes the form of notice pursuant to subsection (b)(2) of this section and for eighteen months thereafter, any person who deposits regulated substances in an underground storage tank shall reasonably notify the owner or operator of such tank of the owner's notification requirements pursuant to this subsection.

(6) Beginning thirty days after the Administrator issues new tank performance standards pursuant to section 6991b(e) of this title, any person who sells a tank intended to be used as an underground storage tank shall notify the purchaser of such tank of the owner's notification requirements pursuant to this subsection.

IDEM is designated as the local agency in 40 CFR Part 280, Appendix II. The form that Taxpayer presented is a copy it recently obtained from the seller apparently filled out in 2005 by the seller of the UST; however, it is incomplete. Taxpayer maintains that after it received this copy from the seller, the form was completed and mailed at around the same time in July 2005. Taxpayer presented anecdotal information to support that claim. Unfortunately, IDEM has no record of the 45223 form being filed in 2005, and without a receipt or other concrete evidence, there is no way to prove that Taxpayer filed the 45223 form at that time.

The Department can only attempt to notify Taxpayers that they owe an annual registration fee if they file the 45223 form with IDEM. Since IDEM has no record that Taxpayer filed the 45223 form with IDEM in 2005, the Department was not aware that it should have attempted to notify Taxpayer that it owed an annual registration fee.

Based upon its position that it filed the forms correctly in 2005, Taxpayer states that if it had been notified that it owed the annual registration fee, Taxpayer would have paid the fee. Even if the Department were to accept that Taxpayer filed the registration forms in 2005 and that the Department should then have attempted to notify Taxpayer after the form was filed, the fact of the matter is that Taxpayer was required to file the forms in 2002, "within thirty days of the existence of such tank, specifying the age, size, type, location and uses of such tank." 42 U.S.C. § 6991a(a)(3). If the form had been filed in 2002 in accordance with 42 U.S.C. § 6991a(a), it stands to reason that the Department would have attempted to notify Taxpayer that it owed the registration fees. Instead, Taxpayer allegedly filed the form in 2005. This means that there were three years in which the Department could

not possibly have known of the UST's existence or that it was required to attempt to notify Taxpayer of its obligation to pay the registration fees. At the very least, Taxpayer failed to timely file its registration forms with IDEM, and therefore also caused the situation in which it did not receive notification of the obligation to pay the registration fees. As it stands, however, Taxpayer has not provided sufficient evidence that the forms were filed in 2005 either. Therefore, Taxpayer has not proved that the Department was ever required to notify Taxpayer of the obligation to pay the registration fees during the years in question. Ultimately, the registration fees were not paid during the years in question, and for that reason, the environmental penalties have been properly assessed.

Taxpayer also contends that because of the amount of time in between when Taxpayer allegedly filed the 45223 form with IDEM and when the Department billed Taxpayer, the collection of the environmental penalties should be barred by the "doctrine of laches." Black's Legal Dictionary defines "laches" as an "unreasonable delay in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought," and is also referred to as "sleeping on rights." Black's Law Dictionary 891 (8th ed. 2004). However, neither IDEM nor the Department has "slept on its rights" in this matter. The Indiana Supreme Court has addressed the doctrine of laches as it applies to the Indiana Department of Revenue in *Ball v. Ind. Dep't of Revenue*, 563 NE2d 522 (Ind. 1990). In that case the Court stated that laches would bar collection by the Indiana Department of Revenue only if the Department attempted to collect the taxes "in an unusually dilatory manner." *Id.* at 525. In Taxpayer's situation, Taxpayer presented no evidence that the Department acted in an unusually dilatory manner in this case. Therefore the doctrine of laches does not prevent the Department from assessing environmental penalties in this case.

Finally, Taxpayer further asserts that the penalties were assessed in an arbitrary manner. Because IC § 13-23-12-7(a) says the penalty shall be "not more than two thousand dollars (\$2,000)," Taxpayer contends that the penalty could be less than \$2,000, and therefore it is arbitrary to assess Taxpayer the full \$2,000 per missed payment when IDEM could have assessed a lesser amount. However, Taxpayer was assessed the amount that is specifically stated in the statute. IDEM is only prohibited from assessing more than two thousand dollars. To assess any more would be unlawful. To assess any less, given that there are no factors listed in the statute or regulations upon which to base a reduction in the environmental penalties, is arguably arbitrary.

FINDING

Taxpayer's protest is respectfully denied.

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